LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 13 1974
MICHAEL RODAK, JR., CLERK

MISC. NO. 73-1003

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL INDIAN YOUTH COUNCIL, INTER-MOUNTAIN INDIAN SCHOOL CHAPTER, an unincorporated association, TEDDY K. AUSTIN, MARGARET DE JOLIE, LEE LUKE BEGAY, and ELSIE JIMMIE,

Plaintiffs-Petitioners,

-vs-

LOUIS R. BRUCE, JAMES HAWKINS, STANLEY SPEAKS, BARBARA EARL, SHERMAN L. NAY, MRS. WAMOTH TANNER, DIXON SMITH, E.A. LEOPARDI, JERRY JAEGER, JOHN CROW, WILMA VICTOR, and ROGERS C.B. MORTON,

Defendants-Respondents.

PETITION FOR REHEARING OF SUPREME COURT'S ORDER DENYING CERTIORARI TO THE TENTH CIRCUIT

Richard L. Young, Raymond Ickes
NATIVE AMERICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
1015 Tijeras, N.W.
Albuquerque, New Mexico 87102
Phone: (505) 247-2449

Attorney for Petitioners

MISC. NO. 73-1003

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL INDIAN YOUTH COUNCIL, INTER-MOUNTAIN INDIAN SCHOOL CHAPTER, an un-incorporated association, TEDDY K. AUSTIN, MARGARET DE JOLIE, LEE LUKE BEGAY, and ELSIE JIMMIE,

Plaintiffs-Petitioners,

-vs-

LOUIS R. BRUCE, JAMES HAWKINS, STANLEY SPEAKS, BARBARA EARL, SHERMAN L. NAY, MRS. WAMOTH TANNER, DIXON SMITH, E.A. LEOPARDI, JERRY JAEGER, JOHN CROW, WILMA VICTOR, and ROGERS C.B. MORTON,

Defendants-Respondents.

PETITION FOR REHEARING OF SUPREME COURT'S ORDER DENYING CERTIORARI TO THE TENTH CIRCUIT

Richard L. Young, Raymond Ickes
NATIVE AMERICAN LEGAL DEFENSE & EDUCATION FUND, INC.
1015 Tijeras, N.W.
Albuquerque, New Mexico 87102
Phone: (505) 247-2449

Attorney for Petitioners

PETITION FOR REHEARING OF SUPREME COURT'S ORDER DENYING CERTIORARI TO THE TENTH CIRCUIT

Pursuant to Rule 58(2) of this Court, petitioners ask that the Court reconsider its Order dated May 28, 1974, denying the petition for a writ of certiorari herein. This petition for rehearing is based upon the grounds of intervening circumstances of substantial effect, and upon other substantial grounds available to petitioner although not previously presented, within the meaning of Rule 58(2).

A. Intervening Circumstances.

On June 12, 1974, the Tenth Circuit decided **Tewa Tesuque v. Morton,** a true copy of which decision is attached hereto as Appendix A. Citing its own decision in the instant case as authority, the Tenth Circuit in **Tewa Tesuque** held that the doctrine of sovereign immunity bars an equitable suit for prospective injunctive relief against named federal officials. In so holding, the Tenth Circuit again deliberately ignored or refused to accept as verities several specific, well pleaded allegations that the defendant federal officials had acted beyond and contrary to their statutory authority and in an unconstitutional manner. Counsel for petitioners here are also counsel for the plaintiffs in **Tewa Tesuque**, and counsel hereby certify to this Court that said allegations of **ultra vires** conduct by the defendant federal officials in **Tewa Tesuque** are clear, specific, and uncontroverted.

Under the decisions of this Court in **Philadelphia Co. v. Stimson**, 223 U.S. 605 (1912), and **Bell v. Hood**, 327 U.S. 678 (1946), federal courts have both the power and the duty to hear equitable suits against lawless federal officials. First

in the instant case, and now more recently in the Tewa **Tesuque** case, federal courts in the Tenth Circuit have arbitrarily declined to hear Indian plaintiffs whose complaints plainly establish justiciable federal questions. The Tenth Circuit's pretext for closing the courthouse doors to Indian suitors is a gross, willful misapplication of the judge-made doctrine of sovereign immunity.

We recognize that the certiori jurisidiction of this Court is discretionary, but even the Supreme Court is capable of abusing its discretion. As was long ago observed, the United State Supreme Court has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. **Cohens v. Virginia**, 6 Wheat. 264 (1821). Just as it is the duty of all inferior courts to follow controlling decisions of the Supreme Court of the United States, **In re Howard**, 9 Wall. 175 (1869), it is the responsibility of this Court to supervise the lower federal courts to make certain that all litigants are treated fairly and with even-handed justice. **Communist Party v. Subversive Activities Control Board**, 351 U.S. 115 (1956); **Mesarosh v. United States**, 352 U.S. 1 (1956). In the past, this Court has not hesitated to restrain a lower federal court from practically nullifying a rule of law established by the Supreme Court. **La Buy v. Howes Leather Co.**, 352 U.S. 249 (1957). For this Court to continue to ignore the Tenth Circuit's perversion of the doctrine of sovereign immunity—first in the instant case, and now in the **Tewa Tesuque** decision appended hereto—is an abuse of the Court's discretion.

If this Court is truly dedicated to equal justice under the law, the Court must take action to deter the Tenth Circuit from its contemptuous dismissal of legitimate

federal claims by Indian suitors. Closing federal courtrooms to aggrieved Indians can only encourage them to resolve their disputes with federal officials by extra-legal means. When another Wounded Knee erupts from the smoldering frustration that still exists in Indian Country, we hope that this Court's indifference will not have been a contributing cause.

B. Other Substantial Grounds.

Supreme Court Rule 58(2) cites **Schriber-Schroth Co. v. Cleveland Trust Co.**, 305 U.S. 47 (1938), as exemplifying "other substantial grounds" for granting a rehearing of an order denying certiori. In **Schriber-Schroth** the Court initially refused to review the Sixth Circuit's decision because there was "no conflict of decision" between circuits. 305 U.S. at 50. On petition for rehearing, the Court was persuaded to grant review by a showing that "litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit." **Ibid.**

The **Schriber-Schroth** rationale is directly applicable to the instant case. Although we had been inclined to view the Tenth Circuit's decision below as merely an unfortunate anomaly in the law of sovereign immunity, the subsequent repetition of the identical ruling by the Tenth Circuit in the **Tewa Tesuque** case displays a continuing and deliberate policy of refusing to hear the merits of Indian suits which present justiciable federal questions under **Philadelphia Co. v. Stimson**, 223 U.S. 605 (1912), and **Bell v. Hood**, 327 U.S. 678 (1946). We know of no other circuit which has displayed, or is likely in the future to display, such infidelity to controlling decisions of this Court. Thus, as in

Schriber-Schroth, it is improbable that there will ever be "litigation elsewhere with a resulting conflict of decision" between circuits, concerning the sovereign immunity question now before this Court.

It is well settled that a court decree can itself constitute a violation of due process which this Court will review and remedy. **Fayerweather v. Ritch**, 195 U.S. 276 (1904). **Accord: United Mine Workers v. Illinois Bar Ass'n**, 389 U.S. 217 (1967).

In **Fayerweather**, the plaintiffs contended that they had been denied procedural due process where the lower courts had reached an adverse legal conclusion without finding a vital fact upon which the conclusion was based. Although the Court ultimately decided the case adversely to the plaintiffs on the merits, the Court first held that jurisdiction was established by plaintiffs' claim of denial of procedural due process by the federal Circuit Court:

> "If a judgment of a state court can be reviewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property...a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. **It is said...that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs** to a share of the estate, **without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to**

> **this fact, but that there never was any finding.** Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U.S. **supra.** Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not detemine the matter of jurisdiction.... We are of opinion that the jurisdiction of this court must be sustained."

Fayerweather v. Ritch, 195 U.S. 276, 298-99 (1904). (Emphasis added.)

In the instant case, plaintiffs have similarly been denied their right to have a legitimate federal claim heard in a federal forum, without any finding of the vital fact which alone could destroy their right— a finding that plaintiffs have not alleged that defendant federal officials have acted beyond or contrary to their statutory authority or in an unconstitutional manner. Of course the courts below did not and could not make such a finding, for the reason that plaintiffs herein have made uncontroverted

allegations that defendants have acted beyond and contrary to their statutory authority and in an unconstitutional manner. Under **Fayerweather**, then, it is clear that plaintiffs have been deprived of a federally protected right without due process of law. And **Fayerweather** makes it equally clear that this Court has the power to redress such a violation of due process by the federal courts below.

Not only does this Court have the power to redress deprivations of procedural due process by inferior courts, but it has the duty to do so:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error... (Citations omitted.)
>
> "Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it... and other averments bearing upon the question of acceptance in fact.
>
> "There remains only the adjudication in the former suit against the first New York company... which the Court of Appeals regarded as concluding defendant upon matters of fact as well as law. But there is nothing in the record to make this judgment conclusive as against the defendant...
>
> "It follows that in this case **res judicata** cannot be regarded as an adequate support for the judgment...

"Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473-76 (1918).

In the last analysis, of course, the Court has the discretion to grant or withhold review. As Mr. Justice Holmes somewhat cynically put it, the law is what the Supreme Court says it is. Yet we cling to the basic belief that the Court listens to other counsels of judicial self-restraint and integrity:

> "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' required an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see **Hudson County Water Co. v. McCarter**, 209 U.S. 349, 355, on a judgment not **ad hoc** and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience...."

Rochin v. California, 342 U.S. 165, 172 (1952).

After the Koerner Commission's conclusion that ours is a racist society, perhaps we should not be surprised that a federal Court of Appeals would deliberately ignore uncontroverted allegations which entitle Indian suitors to have their cases heard in a federal forum—or that the highest court in our land would tacitly approve such judicial malfeasance by declining to review it. Nevertheless, we remain sufficiently dedicated to the concept of equal justice under law, to view the actions of the federal courts in this case as "conduct that shocks the conscience." If Mr. Justice Frankfurter were still on the Court, we think he would concur.

CONCLUSION

Petitioners have demonstrated their entitlement to a rehearing under the terms of Rule 58(2) and relevant decisions of this Court. After three years of futile attempts to get the federal courts to hear the merits of a complaint which it is their sworn duty to hear, we think that Petitioners are entitled not only to a rehearing but an apology as well.

Respectfully submitted,

Raymond Ickes, Richard Young
NATIVE AMERICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
1015 Tijeras N.W.
Albuquerque, New Mexico 87102
Phone (505) 247-2449

Attorneys for Petitioners

Certificate of Counsel

Undersigned counsel of record for Petitioners hereby certifies that the foregoing Petition is presented in good faith and not for delay, and that said Petition is restricted to the grounds specified in Rule 58(2)

Raymond Ickes

APPENDICES

Appendix A— Related Opinion of the Tenth Circuit in **Tewa Tesuque v. Morton**, Rendered After Denial of Certiorari in Instant Case.

APPENDIX A
United States Court of Appeals
Tenth Circuit
No. 73-1817

THE TEWA TESUQUE, an unincorporated association, JOE D. PINO, MARCUS VIGIL, EVA MITCHELL, LORENCITA PINO, JOHN MORA, JOHN VIGIL, SUSIE DORAME, IGNACIA DURAN, BEA REYNOLDS, SHIRLEY DURAN, JOE A. DURAN, ELOY HERRERA, CARMELITA HERRERA, VIVIAN HERRERA, PRISCILLA VIGIL, GILBERT VIGIL, VICKI VIGIL, MARGARET VIGIL, BOB MOQUINO, MARY MOQUNIO, MILLER E. VIGIL, ANASTACIA PINO, EUSEVIA PADILLA, MARIA C. HERRERA, VASELLIO HERRERA, BERTHA VIGIL, REYES DURN, STELLA DURAN, MARZELLA LEAF, MILTON HERRERA, MARSHA LEAF, CINDY HERRERA, GARY MOQUINO, CONNIE MOQUINO, ELMER VIGIL, LORRAINE VIGIL, DONNA HERRERA, CLIFFORD MOQUINO, YVONNE C. VIGIL, CORWIN VIGIL, DONNA MITCHELL, ARNOLD MITCHELL, JAMES F. DURAN, A. ADAM DURAN, RANDY MOQUINO, DENISE L. DORAME, VIRGIE DURAN, CECILIA ENOS, LEONARD ENOS, MARK MITCHELL,

Plaintiffs-Appellants,

vs.

ROGERS C.B. MORTON, individually and as Secretary of the Interior of the United States; LOUIS R. BRUCE, individually and as the Commissioner of the Bureau of the Indian Affairs; WALTER O. OLSON, individually and as the Albuquerque Area Director to the Bureau of Indian Affairs; ROBERT FRIEDMAN, individually and as

Superintendant of the Northern Pueblos Agency of the Bureau of Indian Affairs; JOSEPH KINGSOLVER, individually and as the Bureau of Indian Affairs coordinator for the Tesuque Pueblo or Tribe of Indians, and the SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

Defendants-Appellees.

Thomas E. Luebben, Jr., Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico (Richard L. Young, Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico, on the brief) for Appelants.

Edward J. Shawaker, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General, Albuquerque, New Mexico; Victor R. Ortega, United States Attorney, Albuquerque, new Mexico; Jacques B. Gelin, Department of Justice, Washington, D.C., on the brief) for Federal Appellee.

Dick A. Blenden, Carlsbad, New Mexico, for Sangre de Cristo Development Co., Inc., Appellee.

Before LEWIS, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

This is an appeal from dismissal of a class action brought by members of the Tewa Tesuque (Tewa) of the Pueblo of Tesuque (Pueblo), an Indian tribe, seeking damages and equitable relief against federal officials and for cancellation of a 99-year lease between the Pueblo and Sangre de Cristo Development Company (Sangre).

The Tewas' complaint alleged seven causes of action:

(1) breach of trust by federal officials in negotiating and approving the lease; (2) violation of the NEPA by failure to prepare an Environmental Impact Statement; (3) violation of 25 U.S.C.A. § 415 by federal officials; (4) illegality of the lease under other federal statues and regulations; (5) violation of Tewas' civil rights under 42 U.S.C.A. §§ 1985 and 1988 and under the First and Fifth Amendments to the Constitution of the United States; (6) fraud by appellees in the negotiations for the lease; and (7) creation and maintenance of a public nuisance. The District Court dismissed the complaint for failure to join the Pueblo as an indispensable party and because of the sovereign immunity of the United States.

The appellants include 50 members of the Pueblo, each of whom are members of the Tewa, an unincorporated association of members of the Pueblo who are opposed to the 99-year lease granted to Sangre. Sangre, as lessee, entered into the 99-year lease with the Pueblo, as lessor, on April 17, 1970. By its terms Sangre obtained a lease on a 1,300 acre tract, Tract I, together with lease options on four other tracts consisting of 5,400 acres. Sangre intends to develop the land for residential, recreational and commercial purposes, resulting in a city of non-Indians with a projected population of about 17,000. The subdivision is laid out and designed around an 18-hole golf course. The lease was approved by the Secretary of the Interior on May 24, 1970, pursuant to 25 U.S.C.A. § 415(a) which grants wide discretion. The pueblo is to receive a maximum rental of $20 per acre per year for the leased lands, effective in 1994. For the first twelve years of the lease, the Pueblo will receive $2.50 per acre.

The Tewa contend that the Pueblo is not an indispensable party to the action and that the doctrine of sovereign immunity does not bar this action against federal officials.

I.

The Tewas' contention that the Pueblo is not an indispensable party is erroneous. An indispensable party is one whose interest will be affected by the judgment. As lessor of the lease agreement entered into with Sangre, the Pueblo will certainly be affected if the lease is cancelled. Therefore, it is an indispensable party. Further, the Pueblo may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status.

Rule 19(b), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes four factors which must be considered in determining whether the trial court should dismiss for non-joinder of an indispendable party:

> .... first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In considering the first factor, we conclude that the Pueblo would be prejudiced by a judgment in its absence. If the lease is cancelled it would lose its rental income to be derived therefrom, together with employment opportunities for its members. With reference to the second factor, we hold that the above recited prejudice cannot be lessened if the lease is cancelled. Relating to the third factor, we hold that the judgment sought herein would not be adquate in the Pueblo's absence because it may very likely invite additional lawsuits. Under the last factor, we hold that the Tewa has an adequate remedy available, i.e., bringing the dispute before the tribal council of the Pueblo for

determination. This, we believe, is very critical in light of our well-established policy-rule that courts will not interfere with the internal workings of Indian tribes. Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963). An internal dispute such as this should be decided by the tribal council of the Pueblo and not by the courts.

The Tewa contend that the issue of indispensability of the Pueblo has been decided in Norvell v. Sangre de Cristo Development Company, Inc., Civil No. 9106, F. Supp. (D. N.M. 1974), and Davis v. Morton, 469 F2d 593 (10th Cir. 1972). No final decision has been rendered in **Norvell** and, in any event, the case does not have the immediate effect of depriving the Pueblo of valuable rights under a contract. The **Davis** case held, under the same 99-year lease, that approvals of the lease would be enjoined until an environmental impact statement had been filed. The Court also held that approval of leases on federal lands constitutes major federal action. The suit did not, however, result in cancellation of the lease. **Davis** did not involve the issue of indispensability of the Pueblo.

Any prayer for relief insofar as it relates to the allegations set forth in the second and third causes of action in the complaint, i.e., violation of NEPA by failure to prepare an Environmental Impact Statement and violation of 25 U.S.C.A. § 415 by federal officials, has been rendered moot by our decision in **Davis**. The Court did not err in dismissing the action for failure to join the Pueblo as an indispensable party.

II.

In seeking injunctive relief and damages the Tewa contend that the doctrine of sovereign immunity does not bar this action against the designated federal officials because they acted beyond the scope of their authority in approving the lease.

We hold that this suit against the named federal officials is in reality an unconsented suit against the United States barred by the doctrine of sovereign immunity. National Indian Youth Council, Intermountain Indian School Chapter v. Bruce, 485 F.2d 97 (10th Cir. 1973), appeal pending; McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971). While it is well-settled that government officials may not rely on the defense of sovereign immunity when they act either beyond the scope of their statutory authority or unconstitutionally, we hold that the District Court did not err in holding that the discretionary acts of the appellees exercised in the case at bar are within the outer perimeter of their authority and that they are, accordingly immune from suit. The Tewas' claim for injunctive and damage relief was properly denied.

The Tewa contend that the Administrative Procedure Act applies and that sovereign immunity is not available as a defense where relief is sought thereunder. 5 U.S.C.A. § 701-706. It is fundamental that a party suing under the APA must have suffered a legal wrong because of agency action or inaction. The Tewa have not demonstrated that they are suffering a legal wrong in view of the fact that the Pueblo through its tribal council could have voluntarily filed suit had it determined that the lease should be cancelled. The APA does not provide a basis for review of governmental decisions where the doctrine of sovereign immunity bars suit. Rockbridge v. Lincoln, 449, F.2d 567 (9th Cir. 1971)

AFFIRMED.